OLC 72-0927-A

28 AUG 1972

Mr. Raymond Jacobson, Director
Bureau of Policies and Standards
Civil Service Commission
Washington, D. C. 20415

Dear Mr. Jacobson:

This is to thank you for sending us a copy of Chairman Hampton's 10 August 1972 letter to Chairman Celler concerning Title II of H. R. 12652 and to request your views on the enclosed proposed letter to Chairman Celler from the Director.

Chairman Hampton's letter presents a strong and persuasive case and our only hope is that it will have the impact which it merits.

A thought that has occurred to us is that it may be helpful if someone would alert the Judicial Conference of the United States to the impending legislation and get them to weigh in on those aspects principally concerned with judicial administration. This would include (1) the Conference's 1969 disapproval of that element of the bill which would permit court access prior to the exhaustion of administrative remedies, and (2) resistance to legislation which would increase the case burden on the Federal judiciary which was the subject of Chief Justice Burger's comments to the American Bar Association in San Francisco last week (newsstory enclosed) and which was a point which had favorable impact on the few occasions when we used it on the Hill. It would seem that the Judicial Conference would carry great weight with Chairman Celler and his colleagues.

If you would be kind enough to give us your views on the enclosed proposed letter as soon as it is convenient, it would be helpful as we have been advised by the House Judiciary Committee staff members that a letter from the Director to Chairman Celler would be helpful.

Sincerely,

[redacted]

25X1A

Acting Legislative Counsel

Enclosure

Distribution:
Original - Addressee
1 - Subject (H. R. 12652)
1 - Civil Service Comm.
1 - OLC Chrono

OLC/LLM:smg:mmc (28 August 1972)

THE WASHINGTON POST DATE Tues., 15 Aug. PAGE A3

Burger Cautions Hill on Legislation

By Charlotte Moulton
United Press International

SAN FRANCISCO, Aug. 14 —Chief Justice Warren E. Burger suggested today that because of an "explosive increase" in federal lawsuits, Congress give more attention to the practical effects of legislation that creates work for federal courts.

Noting that the lawmakers now require federal agencies to prepare an "Environmental Impact" statement for such projects as new highways, the Chief Justice said the same kind of background on the effect of a new law could be delivered to the House and Senate Judiciary Committees by whatever congressional committee is proposing the bill.

In his annual "State of the Judiciary" message to the opening assembly of the American Bar Association, Burger also pleaded for more judges and probation officers, the abolishing of three-judge federal courts, and more funds for research in judicial administration.

He called on the ABA to support legislation now before Congress looking toward realignment of the present 11 federal circuits to allow for population shifts and prepare "for the onslaught of litigation in the final third of the century."

He said appeals in the 11 courts of appeals have increased from 4,200 in 1962 to 14,500 in 1972. In the same period, filings in U.S. district courts have increased from 92,000 to 145,000 and the projection for 1990 is 350,000.

Burger said there are now 620 federal judges but 900 will be needed by 1980, with 40 or 50 more needed right now.

Describing the need for probation officers, who supervise convicted persons not sentenced to jail, Burger said some of the 640 officers now working have case loads from 150 to 300 when they should have about 50.

Three-judge courts, composed of a mixture of district and circuit judges, were originally established so as not to place on a single judge the responsibility for resolving important constitutional challenges to state and federal laws and to provide an immediate appeal to the Supreme Court.

Burger said they have disrupted the judges' work and their existence is no longer justified.

At the opening of the ABA meeting Sunday, a high Nixon administration official suggested curtailing the rights of criminal defendants in some cases and allowing the introduction of evidence now excluded because it was illegally obtained.

Assistant Attorney General Henry E. Petersen, head of the Justice Department's criminal division, also proposed tailoring the rights of defendants to the severity of the crime with which they are charged.

"It should not be necessary to provide the same degree of protection" to a defendant in a murder case and one who has been charged with public intoxication, Petersen said. He suggested for example, that six-member instead of 12-member juries could be used in cases including minor offenses.

As for the use of illegally obtained evidence, "unlike coerced confessions, probative evidence is reliable, regardless of the manner in which it is seized," Petersen said.

Petersen made his suggestions for altering the criminal process in a speech before the ABA's section on bar activities.

He suggested taking such offenses as traffic violations out of the criminal justice process and imposing other than criminal penalties in certain instances.

"For example, if a businessman violates a safety regulation, should he be subjected to criminal penalties or would a better remedy be to close down his business concern until he is in compliance with the regulation?" Petersen asked.

He said that civil administrative proceedings also offer possibilities for taking the load off the courts. Another strong deterrent to crime would be making the offender restore the loss to the injured party, he said.

Petersen said it was the "demands of everyday reality that led me to question the basic proposition involved—that is, I quesiton the wisdom of a system which affords every defendant the same degree of protection.

"First, is it necessary to do so in order to assure justice? Second, can the system continue to function if we do not differentiate?"

24 August 1972

DRAFT - JMM

The Honorable Emanuel Celler
Chairman, House Judiciary Committee
House of Representatives
Washington, D. C. 20515

My dear Mr. Chairman:

I am writing to tell you of my very serious concern over the effects upon this Agency of certain provisions of Title II of H.R. 12652. I believe that Chairman Hampton, of the Civil Service Commission, has written to you expressing his concern over the effects of this legislation on agencies of the Executive Branch in general, and I fully subscribe to the points I am told he made in his letter. In addition, however, I an especially disturbed over the impact this legislation would have on certain responsibilities and authorities relating to the protection of intelligence sources and methods.

This Agency's views on bills identical to this proposed legislation have been made known to the Chairman of the Senate Constitutional Rights Subcommittee and the Chairman and members of the House Employee Benefits Subcommittee, and I enclose for your information copies of the relevant correspondence. Chairman Hebert and Chairman Mahon, who as you know share congressional oversight responsibility for this Agency, have fully supported our position in this respect and have on an earlier occasion communicated their views to Chairman Dulski, of the House Post Office and Civil Service Committee.

Because I am convinced that the legislation in question could have a major impact on the security discipline and operational effectiveness of this Agency, we would very much appreciate an opportunity to meet with you at your convenience to explain in detail the reasons for our concern.

Sincerely,

Richard Helms
Director

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C. 20415

8/15/72

Mr. Maury:

Per telephone conversation this morning.

From --
Raymond Jacobson /
Director
Bureau of Policies and Standards

P 14
FEBRUARY 1969

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

August 10, 1972

Honorable Emanuel Celler
Chairman, House Judiciary Committee
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

It is with grave concern that I write you concerning H. R. 12652, a bill to extend the life of the Commission on Civil Rights. This concern relates to the insertion entitled "Protection of Constitutional Rights of Government Employees," the language of which is identical to S. 1438, and previous bills which have received Senate approval.

The Civil Service Commission has reported to the Subcommittee on Employee Benefits of the House Post Office and Civil Service Committee on S. 1438 and similar bills, and has expressed strong objections to what we regard as major faults in the bills.

We do not, I can assure you, take any exception to the stated purpose of these bills, which is to protect civilian employees of the executive branch of the government in the enjoyment of their constitutional rights and to prevent unwarranted invasions of their privacy. We agree that under no circumstances should the price of Federal employment be relegation of the individual to "second class citizenship." But we feel very strongly that the proposed legislation goes beyond the protection of constitutional rights; that it would seriously infringe the proper right and responsibility of managers to see that the business of government is performed effectively and efficiently; that it is completely out of keeping with long-established principles of sound judicial administration in that it provides for summary judicial intervention into the management of the executive branch before the individual has exhausted his available administrative remedy, and that the establishment of a new agency, "The Board of Employee Rights" has a number of faults, the most notable of which is a conflict of statutory responsibilities with those of the Civil Service Commission.

While our reasons for objection are stated in greater detail in my testimony on H. R. 7199, H. R. 7969, and S. 1438 (copy attached), I should like to highlight just a few of the problems created by the present language. It would prevent a supervisor in a munitions storage depot from questioning an employee about forbidden smoking on the job

until the employee's attorney was present. It could bar inquiries about national security, or employee safety. It would, for all practical purposes, negate the ethical conduct program within the executive branch. It could preclude proper investigation of complaints of discrimination because of race, religion or national origin. By calling for a "prejudgment" by the Attorney General before he decided whether to defend an accused Federal supervisor in a lawsuit, it would tend to prejudice a fair hearing in court in the case of a supervisor who would not be defended by the Attorney General.

While we strongly feel that the defects are so serious that the "Protection of Constitutional Rights of Government Employees" insert to H. R. 12612 should not become law, I believe that the legitimate purposes of the insert could be achieved by a suitable, carefully drawn bill. The House Post Office and Civil Service Committee has already given much attention to, and held hearings on, this matter. I would strongly recommend therefore that the matter be divorced from the urgencies of H. R. 12652.

Sincerely yours,

Robert E. Hampton
Chairman

Enclosure

STATEMENT OF ROBERT E. HAMPTON,
CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION BEFORE THE
SUBCOMMITTEE ON EMPLOYEE BENEFITS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES ON

H.R. 7199, H.R. 7969, and S. 1438, Bills "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

May 19, 1971

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

We are pleased that you have requested the views of the Civil Service Commission on the proposed legislation which you have so correctly described in your letter of invitation to be a "most important matter." This is the first opportunity that the present Administration has had to present its views on the matter in a public hearing.

Quite obviously, no one would oppose the stated purposes of the proposed legislation. The protection of the constitutional rights of Government employees and the prevention of unwarranted invasions of their privacy are among the most fundamental objectives of Federal personnel administration. Under no circumstances should the price of Federal employment be the relegation of the individual to "second class citizenship." The problem in the area of employee relations with which we are concerned lies in the task of achieving a fair and reasonable balance between the protection of the legitimate rights of employees and the obligation of managers and supervisors to see that the business of Government is performed effectively and efficiently. Our opposition to the proposed legislation is based on the fact that it will not achieve that balance or the purposes sought in either a fair or effective manner. I will explain that statement during my testimony this morning.

My testimony is directed to the language in S. 1438 which is identical to H.R. 7969 and, for the most part, also identical to the language in H.R. 7199. In the few places where the language differs regarding the coverage of the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency we will note those differences. My testimony is directed to S. 1438 because some of it refers to testimony given earlier by Senator Ervin with respect to legislation of the same type he has introduced in the past. My testimony is, however, fully applicable to the same section and subsection designations in H.R. 7199.

The prohibitory language in section 1 of S. 1438 is, with few exceptions, unchanged from the time the first bill of this nature was introduced in 1966. That fact, in and of itself, is in my opinion a valid objection to the bill. Times have changed; policies and practices have changed; new beneficial procedures and rights for employees have been created over the past 5 years; and reports on earlier bills have consistently pointed out the need for language changes, but the bill is still couched in almost the same terms and is still directed against the same invasions of "alleged" constitutional rights which we believe have long since been corrected when warranted and which, if they should reoccur, are susceptible of what we believe is a more effective means of correction than this bill would provide.

Over the years since 1966 the Senate Subcommittee on Constitutional rights has referred a number of specific cases to the Civil Service Commission some of which we found did warrant corrective action. But those instances have been relatively few in number and not of a character that we feel warrants special legislation of this type. If there really is the large number of these cases that has been alleged, we frankly do not understand why the labor organizations within Government, with the effective grievance procedures which many of those

organizations helped to stampede through negotiated agreements have not brought those cases up for resolution. This is particularly so when you consider that since August 1966 when the first bill of this type was introduced the number of Federal employees represented by labor organizations has grown from 1,054,000 to last November's count of 1,542,000--an increase in union representation of from 40% of the covered work force to 58% of that work force.

When I referred to invasions of "alleged" constitutional rights a few moments ago I did so deliberately. While I am not a lawyer, I never heard of a constitutional right that would be violated by asking selected employees to report their financial interests in order to protect the Government against conflict of interest involvement. If some part of the Constitution is violated by requiring such a disclosure, then the Senate itself has been violating that constitutional right for years when in its "advice and consent capacity" it requires prospective Presidential appointees to make those very same disclosures only in more detail and in public (ours are made and kept in confidence).

Also, what part of our Constitution entitles an employee who is (to use the words of section 1(k) of the bill) "under investigation for misconduct" (such as smoking in a restricted area of a munitions storage depot) to have his attorney present before his supervisor can ask him whether or not he was smoking? If there is such a constitutional right it surely is not limited to Government employees and I believe our business leaders and industrial supervisors in the private sector will be amazed to learn that such discourse with an employee is unconstitutional.

But I will leave to the lawyers the question of whether the matters covered by the bill are really matters of constitutional right because I want

to devote sufficient time [illegible] to what I, as an executive officer charged with responsibilities in the area of Federal personnel management, regard as particularly bad legislative proposals in the bill.

When Senator Ervin testified before this Subcommittee on July 2, 1968, he said the bill then under consideration which was identical in purpose to the ones under discussion today dealt with specific violations of the First Amendment rights of applicants for, and employees of, the Federal Government. He also said the bill (at that time it was S. 1035)--and I quote--"does not affect the power of the executive branch to deal with employees within the proper confines of the employment relations." In the same vein, the Senator said the bill would not affect--and again I quote--"the authority of Federal managers to manage". I must respectfully but emphatically disagree with the Senator's appraisal of the bill's effect.

I have already given you the example of the supervisor who would not be allowed to ask the employee if he was or was not smoking which strikes me as a quite severe curtailment of the proper authority of a Federal manager to manage. Consider also what restrictions would be placed on proper management by section 1(d) of the bill.

Section 1(d) would bar a supervisor from requesting an employee to report on any of his activities unless they are related to the performance of official duties which are or may be assigned to him, or the skills which qualify him for those duties, or unless there is reason to believe he is engaged in conflict of interest activities. That provision could prevent the Civil Service Commission from asking an employee about an alleged violation of the Hatch Act; it could bar inquiries in areas relating to national security and employee safety; and it could prevent the resolution of complaints received

from a concern about the outside conduct of a Government employee. For example, a supervisor may have received information that an employee who operates heavy industrial equipment has been drinking heavily during his off-duty hours and is keeping such late hours that his job efficiency could in time be impaired. As we read section 1(d), the supervisor could not ask the employee for a report on these matters and, presumably, would have to wait until the employee's condition became such as would justify the inquiry as being related to the performance of the employee's duties. Even then, as explained earlier, the supervisor could not discuss the matter with the employee unless the employee had his attorney present.

Now we are confident that incongruous results such as these were not intended but we have offered simple, clarifying amendatory language to prevent these results and none of it has been adopted. This is why we are seriously concerned over the bill; it is still drafted in the same 1966 language even though the seriously adverse effect of that language on proper management prerogatives has been clearly spelled out in earlier reports.

This Subcommittee has the expertise to understand and deal with the very fundamental issues raised by the proposed legislation. In order for the business of Government to be carried out effectively and efficiently, the managers and supervisors in Government (just as their counterparts in the private sector) must have the proper authority to manage and supervise. What we ask is that you give fair consideration to the marked extent that this bill would interfere with the exercise of those proper authorities.

Some of that interference could seriously damage Governmental efficiency. Today, within the executive branch, we have an ethical conduct program designed to prevent employees who occupy positions which could involve them in conflict

of interest provisions primarily directed at Executive Branch regulations. The regulations under which that program operates are open for all to examine; they are published in the Code of Federal Regulations. Our program stresses the confidential treatment of the financial interest statements filed by employees and expressly provides a means to resolve a complaint by an employee who feels his position is one that should not require that he file such a statement.

I want to emphasize that our ethical conduct program is a preventive one; we do not (as sections 1(i) and 1(j) of the bill would require) wait and ask for a report on specific items tending to indicate a conflict of interest. We get the information in advance and by examining it, and consulting with the employee as necessary, conflicts involvements are avoided. The restrictive language of the two subsections mentioned would negate, for all practical purposes, the ethical conduct program within the executive branch. We have explained this in detail in the past and we have submitted amendatory language to correct what we regard to be serious errors in the drafting of those subsections but none of that language has been adopted. I cannot bring myself to believe that the Congress intends to terminate the ethical conduct program of the executive branch. But as we find the same unchanged language used year after year we cannot be other than disturbed over what appears to be a lack of real appreciation of what that language would do.

I have not taken the separate subsections of section 1 of the proposed legislation up in their order of appearance because I wanted to make certain important points clear to the Subcommittee from the start. I will, however, now go back and starting with subsection (a) of section 1 I will discuss those

provisions which I urge the Subcommittee to consider. What I urge you to consider is whether or not these provisions interfere with proper--and I emphasize the word "proper"--management authorities.

Section 1(a) is a good illustration of why we feel the bill is out of date. Section 1(a) would prohibit an official from requesting an applicant or employee to disclose his race, religion, or national origin. The executive branch used such a self-disclosure method only once and that was in 1966. For the past 4 years we have used the visual identification method which is not proscribed by the proposed legislation. So in that regard the prohibition in the bill does not concern us. What does concern us, however, are the inferences that when we collect data on race, religion, or national origin we do it for the purpose of determining a person's qualifications. Nothing could be farther from the truth.

The Civil Service Commission authorizes the collection of race or national origin data by visual identification under strict controls which are spelled out in the Code of Federal Regulations. [Subpart C of Part 713 of Title 5, Code of Federal Regulations.] This is done in keeping with merit system principles to further the policy of Congress set out in section 7151 of title 5 of the United States Code to insure equal employment opportunities for all our citizens without regard to race, religion, national origin or other irrelevant considerations. In order to achieve the goal of real equal employment opportunity it is essential that we have statistical information showing how different races fare in obtaining Federal employment and in advancing in that employment to their full potential. Congress authorized that to be done among private employers by the Civil Rights Act and the Equal Employment Opportunity Commission does just that--requires private employers to collect data on their employees' color, race, sex, and national origin.

If this activity is good and proper to do among private employers, why do the proponents of this bill ascribe an invidious intent to the Commission when we require it among executive branch employers?

Please understand that we are clearly aware that the prohibition in the proposed legislation is against self-disclosure of one's race, religion, or national origin. We have no objection to that general prohibition but we do object to the repeated erroneous inferences that these data are collected to determine a person's qualifications. In addition, we object to the language in the bill which would prevent an executive official from making an inquiry that would enable him to resolve a complaint by an employee that he has been discriminated against because of his race, religion, or national origin. Senator Ervin testified in 1968 that he thought it would be "very difficult to tell a Presbyterian by the way he parts his hair". We agree with that conclusion by the Senator and unless we can ask about the religious composition of a segment of an agency's work force with regard to which a discrimination complaint is pending there is no realistic way to decide if it is true that a named supervisor never hires or promotes protestants or catholics or whatever the charge encompasses.

Once again I ask the Subcommittee to consider what is required of proper executive branch management. Are we to turn away such a complaint with the explanation that a Congressional enactment prevents its resolution? That seems to us to be a serious interference with proper executive management particularly in view of the fact that the Equal Employment Opportunity Commission makes precisely the same kind of inquiry of private employees in enforcing the counterpart provisions of the Civil Rights Act.

We explained in our report last year on S. 782 to the Subcommittee on Manpower and Civil Service how section 1(a) could be amended to prevent it operating as a bar to the proper resolution of discrimination complaints. All that is needed is to add a simple proviso to the effect that the subsection does not prohibit a request for information concerning race, religion, or national origin when the matter is in issue in a discrimination complaint case. But, again, the amendatory language was not used.

At this point I ask permission to include in the present record the Commission's report on S. 782 as that report is directly applicable to the proposed legislation now being discussed as it is identical thereto in all substantive respects.

The Commission has no objection to section 1(b) now that the legislative history shows the Congressional intent with regard to the operation of that provision which relates to an agency taking note of employees' attendance or nonattendance at meetings unrelated to their official duties. The Senate Report [No. 91-873] on S. 782 specifies that section 1(b) is designed to protect employees from being compelled to attend meetings on political, social, and economic matters unrelated to their employment. The Report specifies that the subsection does not affect the existing authority of agencies to promote health and safety or to advise of agency sponsored activities or savings bond or charity fund campaigns.

We have only a minor problem with section 1(c) in that it could be interpreted so as to interfere with worthwhile activities such as the blood donor program as we do request employee participation in that program and the program is not related to employees' official duties. To prevent the subsection from causing a result not intended, a brief proviso is needed to prevent the

subsection from being interpreted as prohibiting the use of publicity to inform employees of requests for assistance by public service organizations such as the Red Cross.

I have already covered section 1(d) and we can accept section 1(e) without amendment. The language in section 1(e) prohibiting the interrogation of an employee about his "personal relationship" with a relative will not interfere with inquiries needed to resolve nepotism cases under section 3110 of title 5 of the United States Code as those inquiries relate to "relationship" alone as distinguished from "personal relationship".

Section 1(f), which relates to the use of polygraphs, is not of concern to the Civil Service Commission as we do not use those instruments. In that regard we feel the Subcommittee should give careful attention to the submissions of the Executive agencies that deal with intelligence, counter-intelligence, and international-affairs matters such as the recognized security agencies and the Department of Defense and the Department of State.

At this point I want to call the Subcommittee's attention to the one difference between S. 1438 and H.R. 7199. The Senate bill, in section 9, excepts the Federal Bureau of Investigation from the bill entirely. The House bill, in section 6, excepts the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency from the polygraph and psychological test prohibitions and the prohibitions against the submission of a financial disclosure statement when the head of the agency concerned makes a personal finding that the test or financial statement is required to protect the national security. The Senate bill limits that partially excepting provision to the Central Intelligence Agency and the National Security Agency by reason of its complete exception of the Federal Bureau of Investigation.

Section 7 of the House bill and section 8 of the Senate bill provide guarantees that the bills will not operate to prevent the heads of these security agencies from withholding information pursuant to statute or Executive order and bar the use of such information in any proceeding authorized by the proposed legislation.

In addition, the Senate bill provides in section 7 that no employee of the Central Intelligence Agency or the National Security Agency and no individual or group acting in behalf of such an employee may use the grievance or judicial review procedures under the bill without first submitting the grievance to his agency. The section also preserves to the heads of those agencies their statutory authority to terminate employees when that termination is required in the interests of the United States.

The Civil Service Commission accedes to the views and judgments of the three security agencies regarding these provisions but we do have one observation that may aid the Subcommittee in considering this matter. Within the executive branch we have recognized that because of the extremely sensitive nature of the duties of the employees of these security agencies it is not appropriate or in the interests of the United States to cover them into the usual personnel provisions. For two recent examples of their exclusion I call the Subcommittee's attention to Executive Order No. 11491 relative to labor-management relations which allows their exclusion in section 3 and to the new Part 771 of the Civil Service Regulations relative to employee grievances and administrative appeals which excludes those security agencies. In our best judgment we believe that each of these security agencies should be completely excepted from the proposed legislation in the same way the Federal Bureau of Investigation is excepted in section 9 of S. 1438.

Returning now to section 1 of the proposed legislation, we regard subsection (g) of that section to be out of place in these bills. Subsection (g) is a prohibition against coerced political activity by Federal employees. The coverage of the subsection is almost identical to sections 7321 through 7324 of title 5 of the United States Code. Also, the subsection is largely duplicative of section 602 of title 18 of the United States Code which makes it a crime for a Government official or employee to directly or indirectly solicit a contribution "for any political purpose whatever" from another Government official or employee.

While the Commission favors the objective of protecting Government employees against any form of coerced political action or support, we do not believe that such a provision is dependent on a constitutional right or belongs in proposed legislation of the type with which we are dealing. Also, as I indicated earlier, we do not consider it proper to enact duplicative legislation.

If the Subcommittee believes that strengthened political activity protections are needed for Government employees we urge that this be done by way of separate legislation that would take into consideration the statutory protections now on the books and supplement them as required rather than enacting duplicative legislation that could result in confused enforcement.

Section 1(h) is another instance of what we consider an unnecessary and outdated legislative proposal. Actually what subsection (h) does is express the executive branch policy which prohibits the coercion of employees to invest in Government bonds or to make charitable donations. For example, the "Manual on Fund Raising within the Federal Service for Voluntary Health and Welfare Agencies", December 1967 edition, stresses "true and voluntary giving" and

expressly states: "Any practice that involves compulsion, coercion, or reprisal directed to the individual * * * employee because of the size of his contribution or his failure to contribute has no place in the Federal program." Moreover the Manual specifies that employees should be informed that if they believe the executive branch policy against coercion has been violated, they may file a complaint under the agency's grievance procedure or directly with the Civil Service Commission without going through the agency's grievance procedure.

With respect to the sale of United States Savings Bonds, the executive branch policy, as set by the United States Savings Bond Division of the Treasury Department is that the use of coercion in the promotion of bond sales is contrary to the objectives of the program and a violation of Government policy. Executive agencies are alert to the prohibition against coercion and in that regard I call the Subcommittee's attention to issuances by the Secretary of the Navy (SECNAVNOTE 5120 of 1 April 1971), the Postmaster General (memorandum of March 16, 1971), the Chief of Staff of the Air Force (memorandum of 6 March 1971), and Department of the Army Circular No. 608-36 of 9 March 1971, each of which stresses the voluntary nature of the bond sales program and warns against the use of pressure or coercion.

The point I want the Subcommittee to consider with regard to subsection (h) is the same that I have made reference to with regard to other subsections. The statutory provision is not necessary as there is already in existence a clear and adequate administrative control that will accomplish exactly what the proposed statute would do. Please understand that we are aware that a few overzealous individuals have violated our administrative provisions and

used coercive tactics. But no provision, whether administrative or statutory, can be guaranteed against breach by what Senator Ervin so aptly described last week as "all manner of fools and their follies." We believe, however, that the existence of the administrative provisions, which are enforceable through established grievance procedures, evidence that a statutory provision of the type proposed in subsection (h) is not neeessary. However, as the subsection is wholly in keeping with our policy we have no objection to its enactment with the one minor clarifying language change. That change would substitute the word "section" for "subseetion" on line 9 of page 6 so that neither subsection (e) nor (d) is interpreted as negating the proviso in subsection (h).

I have already eovered subsections (i) and (j) relative to financial disclosures under the ethical conduct program. But in passing I note that Senator Ervin indicated in 1968 when he testified before this Subcommittee that he had complaints from professional employees in high-ranking positions over the requirement that they file financial statements. The Senator states "No one in the executive branch has listened to them. That is why Congress must." I cannot help but wonder if those complaints arose before June 9, 1967, when we added a specific right for an employee who felt he should not be required to submit such a statement to file a grievance. If the complaints were submitted after that 1967 date, I would wonder if the complainant made use of the procedure available to him and if not -- why not?

Section 1(k) is the provision I have already discussed which could entitle an employee to have his attorney present whenever his supervisor made inquiry of him about a matter that could lead to disciplinary action.

The Department of Justice believes that section 1 is unreasonable as it would, quite properly, prohibit any disciplinary or retaliatory action against an employee who did not comply with a request, or submit to an action, made unlawful by the proposed legislation.

Section 2 would make the prohibitions in section 1 applicable to the officers and employees of the Civil Service Commission. If section 1 and the counterpart provisions in section 2 are amended as we have recommended, we would have no objection to section 2. Similarly, we do not object to section 3 which, in effect, makes the section 1 prohibitions applicable to commissioned officers and members of the armed forces provided, again, our amendments of section 1 are adopted.

Section 4, however, is another matter. That section authorizes summary judicial intervention into the management of the executive branch which both we in the executive branch and the judicial branch believe is totally uncalled for. Under section 4 an applicant or employee would be able to sue a Federal officer or employee, in his individual capacity, on the basis of an allegation that the Federal officer or employee had violated or threatened to violate the bill's prohibitions. Moreover, that law suit could be started without the exhaustion of available administrative remedies and without any showing of pecuniary injury. Such summary judicial intervention is completely out of keeping with the long-established principle of sound judicial administration that an individual is not entitled to turn to the courts for judicial relief until he has exhausted his available administrative remedy.

An even more peculiar aspect of this provision is the fact that while section 5 sets up an elaborate administrative remedy for handling the grievances covered by the bill through a new Executive agency (the Board on Employees' Rights), section 4 does not require that an applicant or employee

file his [illegible] remedy before going directly to court. That peculiar aspect of the bill is referred to on page 60 of the report of the proceedings of the Judicial Conference of the United States issued December 18, 1969, by Chief Justice Warren E. Burger. In that report the Conference expressed its disapproval of section 4 by noting that the section -- and here I quote from the Report -- "would give the employee the right to go directly into the Federal courts. Inasmuch as section 5 of the bill provides for the utilization of the administrative process by the aggrieved employee, the Conference disapproved section 4 as being inconsistent with the provisions of section 5." With the permission of the Chairman I would like to include into the record at this point a copy of pages 60 and 61 of the Judicial Conference Report containing the disapproval to which I have referred.

Another facet of section 4 that we consider objectionable is the provision which requires the Attorney General to defend any officer or employee sued under the section who acted pursuant to an order, regulation, or directive, or who, in the opinion of the Attorney General, did not willfully violate the provisions in the bill. With all due respect for the Attorneys General, for whom I have always held the greatest respect, this provision would make him become what might be termed a "prejudgment judicial officer." By that I mean that once a law suit is filed against an officer or employee for an alleged violation of the bill, the Attorney General would have to decide first whether the officer or employee acted pursuant to an order or regulation and, if he did, then decide if the employee willfully violated any proscription in the bill. Frankly, if the Attorney General makes those decisions adversely to the employee and decides not to defend the employee, and the employee shows up in court with a private attorney, the court will know that his case has been prejudged by the Attorney General and the employee will, in effect, be starting out with 3 strikes

against him. If any type of access-to-court provision should be included in the legislation, and we hope it is not, we strongly urge that the Attorney General have a free hand to defend any officer or employee without any statutory requirement for a prejudgment determination on his part.

Section 5 would create a new Executive agency (the Board on Employees' Rights which I will refer to as "the Board"). The Board would be composed of 3 part-time members appointed by the President, by and with the advice and consent of the Senate, whose function would be to hear and decide grievances filed under the bill. The Board would have a small staff -- I say small because the bill places a limitation of $100,000 on the expenditures to carry out section 5 -- which would investigate any complaints received and within 10 days from the date of receipt of a complaint set a hearing on the complaint. Within 30 days after the hearing (which would be held in accordance with the administrative procedure statute insofar as possible), the Board would issue a final decision. If the Board found a violation, it could issue a cease and desist order, or direct that the offending civilian officer or employee (other than a Presidential appointee appointed by and with the advice and consent of the Senate) be disciplined. The discipline could range from reprimand to removal. In the case of a Presidential appointee, the Board would make a report on the violation to the President and the Congress. In the case of a member of the armed forces, the Board would refer the matter to a person authorized to convene a general courts-martial.

There are many aspects of section 5 that we feel are bad, but in our judgment the worst aspect of it is that the creation of the Board would amount

to a Congressional rejection of particular labor-management programs in an affirmative, cooperative labor-management relations program. Each of the eleven basic prohibitions in section 1 are matters that in whole or in part could be the subject of negotiations between a Government labor organization and management and each of the items that prompted these provisions (for example a coerced bond purchase) is something that is susceptible to settlement under an agency's grievance procedure. And, again, I want to point out that an appreciable number of those grievance procedures exist because of negotiated agreements between a labor organization and management. We are convinced that this is the right way to resolve employee grievances and that to segregate these eleven grievances for processing under the formal administrative procedure rules designed for the use of regulatory agencies would create an adversary action under a negative concept wholly at odds with the objective of achieving an affirmative, cooperative labor-management relations program.

Closely related to our first objection to section 5 is our second objection which is that there is no logical reason for creating a new Executive agency whose limited purpose is to resolve eleven types of grievances while all other grievances and the more serious matters of appeals relating to adverse actions (such as demotions, suspensions, and removals) are to continue to be processed under the currently operating agency and Civil Service Commission procedures. I find it impossible to understand the rationale that allows an employee who has been asked (not ordered, just asked) to donate blood to the Red Cross, to hail his supervisor into a Federal

court or file a complaint for processing through a separate Executive agency under the complexities of the administrative procedure statute, while his coworker who has been fired on grounds he believes are false, processes his appeal through the normal administrative channel and only after exhausting that administrative remedy is he entitled to judicial review.

I want to emphasize that I do not question the authority of the Congress to make it "unlawful" -- that is the word used in section 1 -- to request an employee to participate in the blood donor program, but I do question whether the Congress intentionally would make the correctional processes for a breach of such a relatively inconsequential unlawful act markedly more elaborate and complex than those it has authorized for the far more serious unlawful act of removing a veterans' preference employee on baseless charges.

There is also a practicable objection to the creation of the Board. While we have no way to estimate the number of complaints such a Board would receive, we believe its very creation would prompt some applicants and employees with either real or imagined grievances to file complaints. Assuming these complainants reside in different parts of the country we cannot help but wonder how this Board with its small staff and no field offices could possibly cope with even a minor workload. Keep in mind, also, that the Board members are part-time officers whose other regular employment would be bound to prevent their ready availability for travel either about the country to hold hearings or to the Board's central office to decide

the grievances. We assume the Board members will have other regular employment as their pay is fixed in section 5 at $75 a day which is approximately the same daily rate for an employee in the 10th step of grade GS-12. I consider it rather unrealistic to expect to employ Presidentially appointed officers to head up an Executive agency at such a low salary, but if they can be found they will surely need some regular outside employment or income beyond this part-time appointment.

The Subcommittee should also note that section 5 would create a conflict between the Board's statutory rights and the statutory rights of the Civil Service Commission. For example, section 5 authorizes the Board to "order" an employee's removal. We assume that such an order would be directed to the employing agency and that the agency would comply with it. The employee who was so removed would, under the veterans' preference statute and the competitive-service job protection program established under the civil service statutes, have the right to appeal the removal to the Civil Service Commission. In such an appeal, the regulations of the Commission provide that the employee is entitled to a hearing at which he is represented by an attorney, a union officer, a veterans organization, or other counsel. If that hearing establishes that the employee's removal was not justified, the Commission will order his agency to restore him which entitles him to back pay benefits under the back-pay statute. We do not consider it reasonable to enact legislation that creates this kind of conflict of authorities.

In brief we see no need for a Board of the type referred to in section 5 and feel that such a Board if established would be unable to cope with the task put upon it and would create serious intra-executive branch conflicts.

The only substantive section on which I have not commented is section 10. That section initially provides that neither the establishment of the Board nor the right of summary recourse to the courts prevents an agency from having a grievance procedure to enforce the provisions of the bill, but the section then negatives that initial provision by providing that the existence of such a procedure would not require an employee to use it and he could take his grievance directly to a court or to the Board. Section 10 also states that if an employee elects to go to the Board under section 5 he waives his right to go to court under section 4 and vice versa.

In conclusion, I hope I have been able to persuade the Subcommittee to focus on what we sincerely believe are provisions in the proposed legislation that are sorely in need of elimination or modification. I want to stress to the Subcommittee that all we ask of you is a fair consideration of the many ways that this proposed legislation would interfere with the proper management of the executive branch. I have no doubt that the proposed legislation, when originally drafted approximately 5 years ago, was motivated by a genuine concern that legislation was needed to protect employees of the Government with regard to several aspects of their employment. But this is 1971 not 1966 and if there is any need for legislation of the type proposed--which we feel has not been established--there is an equal need that it be drafted with care so that the business of Government is not restricted by unwarranted restraints on proper management actions.

We have, in the past, offered to make the Commission's staff available to prepare a bill that would achieve every reasonable and necessary protection of employee's rights while it concurrently recognized the reasonable and necessary requirements of executive branch management. I renew that offer today, and I am confident that joint cooperation in this regard will benefit all concerned.